Kumpulan Liziz Sdn Bhd (in liquidation) v Pembinaan Azam Jaya Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(NCvC)(A)-1922–12 OF 2020
LEE SWEE SENG, RAVINTHRAN AND GHAZALI CHA JJCA
25 NOVEMBER 2021

Companies and Corporations — Winding up — Disputed debt — Respondent petitioner filed winding up petition against appellant for failure to repay advance payment upon repudiation of joint venture agreement — Winding up court found that debt was not in dispute — Winding up court made winding up order — Whether there was bona fide dispute on debt for which respondent petitioner sought to wind up appellant — Whether appellant's filing of application for judicial management would stay all winding up proceedings that were pending including advertisements and gazette of petition — Whether fact that appellant was insolvent would be sufficient cause for winding up order to be made — Companies Act 2016 ss 410(c) & 466(1)(a) — Companies (Winding-Up) Rules 1972

The petitioner in the court below ('the respondent') was the employer in a joint venture agreement ('the JVA') between the respondent and the contractor ('the appellant') for a Pan Borneo Highway Sabah Project, Package 6 ('the project'). The JVA was later repudiated by the appellant. After the repudiation of the JVA, the respondent had issued a statutory winding up notice ('the statutory notice') pursuant to s 466(1)(a) of the Companies Act 2016 ('CA 2016') to the appellant for a debt in the form of advance payment which the respondent having received it from its principal, had passed on the contractor's portion to the appellant. Due to the failure of the appellant to pay the debt within the stipulated period, the respondent proceeded with the filing of a winding-up petition against the appellant. At the end of the trial, the winding up court held that the debt was not in dispute, consequently, a winding up order was made against the appellant, hence, the present appeal. The appellant contended that the debt was disputed based on the following facts: (a) the advance performance bond and the performance guarantee procured by the appellant from Maybank which had not been cancelled; (b) the charges imposed by Maybank for the above facilities; (c) the appellant's cross claim against the respondent for the sum of RM1.5m being the outstanding sum of the quarry crushing plant and vehicles sold by the appellant to the respondent; and (d) the misrepresentation of the respondent in taking over the banking facilities of the appellant for the project upon the termination of the JVA. The issues to be determined were: (i) whether there was a bona fide dispute on the debt for which the respondent petitioner sought to wind up the appellant; (ii) whether

A the appellant's filing of an application for judicial management would stay all winding up proceedings that were pending including advertisements and *gazette* of the petition; and (iii) whether the fact that the appellant was insolvent would be sufficient cause for the winding up order to be made.

B **Held**, allowing the appeal and setting aside the winding up order of the High Court with costs RM10,000 here and below to the appellant subject to allocatur:

(1) Based on the strict requirements of the deeming provision of s 466(1)(a) C of the CA 2016, there was no debt due if the sum stated in the statutory notice was being disputed bona fide and on substantial grounds. There was also correspondingly no neglect to pay the sum demanded and likewise the party demanding payment did not stand in the position of a creditor with respect to the company that was sought to be wound up. D Whilst the statutory demand was a pre-requisite for invoking the deeming effect of an inability to pay the sum demanded, it was not prima facie evidence of a debt owing. Whether or not there was a sum due and owing to the petitioner would have to be proved based on facts not seriously in dispute and if there were serious disputes on the sum due as E gleaned from the affidavits filed, then clearly the procedure of a petition to wind up a disputed debt, in the face of conflicting affidavits would not be suitable procedure to resolve the matter and the petition would have to be dismissed as being an abuse of the court's process (see paras 45, 51 & 54).

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(2) The court would accept the fact that for a case like this, the employer (the respondent) was not obliged to take over any of the facilities taken by the contractor (the appellant). However, where the respondent was still enjoying the benefit of the facilities taken in the advance payment bond and the performance guarantee and that there appeared to be some G evidence that the respondent had been using some of the facilities taken by the appellant as set out in the appellant's solicitors CK Lim, Tenh & Chong's letter of demand dated 27 December 2019 to the respondent, it could not be said that the debt for which the respondent was seeking to H wound up the appellant was not disputed or that the appellant did not have an arguable and bona fide crossclaim or set off against the debt alleged and on substantial grounds (see para 123).

(3) It was not for the winding up court to descend into the details of the set-off that the appellant had raised via its affidavit to oppose the petition I and to weigh and consider the probabilities of success lest the petition be converted into a writ action which would not be amenable to resolution by way of conflict in affidavit evidence. The winding up court was to assess without deciding on the counterclaim in a sieving through process to see if the claim had weight or raised a serious issue. So long as the

set-off, cross claim or counterclaim was not completely fanciful and for so long as it had the colour and cover of credible claim in the context of the alleged debt being disputed and on substantial grounds, the court would not be comfortable to grant a winding up order but would instead dismiss the petition (see paras 125–126 & 130).

(4) Section 410(c) of the CA 2016 was quite clear in that all proceedings are stayed and that would include a winding up petition. Upon the application of the judicial management order ('JMO') but before the making of such order, there shall be a moratorium on all other legal proceedings. It would be quite inconsistent to say that there shall be no order made for winding up of the company after the filing of an application for a JMO but that nevertheless all requirements under the Companies (Winding-Up) Rules 1972 with respect to compliance with the procedure set out under the Rules may still be proceeded with. Even if the advertisements and *gazette* of the petition were not strictly speaking steps in the proceedings, surely the filing of the affidavits of service with respect to advertisement and *gazetting* so as to enable the Rule 32 Certificate to be issued by the registrar would be 'continuing with the proceedings' (see paras 131 & 137–138).

(5) The learned judge was concerned about possible abuse of the JMO application just so that all proceedings may be stayed pending the hearing of the JMO application. The solution was already built into s 410 of the CA 2016 itself in that leave to proceed may be applied for and the court may exercise its discretion to grant leave where there were cogent reasons for such a leave and the court may even impose such terms as the court may deem fit in granting the leave (see para 139).

(6) The question of whether the appellant was insolvent was of no relevance if in the first place there was no genuine debt due and owing from the respondent. It was for the creditors who had judgment debts or undisputed and genuine debts to decide on whether they should wind up the appellant or enter into a composition with them or to approve or disapprove the appellant's proposal in a judicial management application such as the one filed by the appellant before the petition was heard. Even with the appellant admitting its own insolvency in the JMO application, that did not derogate from the principle that only a creditor for an undisputed debt had the legal standing or locus to present a winding up petition (see paras 140–141 & 145).

(7) This was a case where upon the termination of the JVA, there was more than met the eye where the respondent's claim and the appellant's counterclaim were concerned. The debt was being disputed bona fide and on substantial grounds. The court could not afford to take a skewed and selective reading of the obligations of the parties that were still outstanding especially regarding the advance payment bond and the

performance guarantee procured by the appellant from Maybank which had not been cancelled. In addition to the above were the charges imposed by Maybank for the above two facilities and the dispute in the purchase of the quarry plant, vehicles and equipment. Further, the subject matter of the counterclaim with respect to the misrepresentation raised by the appellant was not so fanciful as to dismiss it here and now as being fictional, frivolous and a figment of one's imagination (see paras 154–156).

[Bahasa Malaysia summary

Pempetisyen di mahkamah bawahan ('responden') adalah majikan dalam perjanjian usaha sama ('JVA') antara responden dan kontraktor ('perayu') untuk Projek Pan Borneo Highway Sabah, Pakej 6 ('projek'). Perjanjian usaha sama tersebut kemudiannya dibatalkan oleh perayu. Selepas pembatalan JVA tersebut, responden telah mengeluarkan notis penggulungan berkanun ('notis berkanun') menurut s 466(1)(a) Akta Syarikat 2016 ('AS 2016') kepada perayu untuk hutang dalam bentuk bayaran pendahuluan yang mana responden telah menerimanya daripada prinsipalnya dan telah menyerahkan bahagian kontraktor kepada perayu. Disebabkan kegagalan perayu membayar hutang tersebut dalam tempoh yang ditetapkan, responden meneruskan dengan pemfailan petisyen penggulungan terhadap perayu. Pada akhir perbicaraan, mahkamah penggulungan memutuskan bahawa hutang tersebut tidak dipertikaikan, akibatnya, perintah penggulungan telah dibuat terhadap perayu, oleh itu, rayuan semasa. Perayu berhujah bahawa hutang tersebut adalah dipertikaikan berdasarkan fakta berikut: (a) bon pelaksanaan pendahuluan dan jaminan pelaksanaan yang diperolehi oleh perayu daripada Maybank yang tidak dibatalkan; (b) caj yang dikenakan oleh Maybank untuk kemudahan-kemudahan di atas; (c) tuntutan silang perayu terhadap responden bagi jumlah RM1.5 juta yang merupakan jumlah tertunggak loji penghancur kuari dan kenderaan yang dijual oleh perayu kepada responden; dan (d) salah nyataan responden bahawa responden akan mengambil alih kemudahan-kemudahan perbankan perayu untuk projek tersebut apabila JVA ditamatkan. Isu-isu yang perlu ditentukan ialah: (i) sama ada terdapat pertikaian bona fide mengenai hutang yang menjadi sandaran untuk pempetisyen responden menggulung perayu; (ii) sama ada pemfailan permohonan bagi pengurusan kehakiman oleh perayu akan menghentikan semua prosiding penggulungan yang belum selesai termasuk pengiklanan dan *pewartaan* petisyen tersebut; dan (iii) sama ada fakta bahawa perayu tidak solven akan menjadi sebab yang mencukupi untuk perintah penggulungan dibuat.

Diputuskan, membenarkan rayuan dan mengenepikan perintah mahkamah penggulungan dengan kos RM10,000 di mahkamah ini dan mahkamah bawahan tertakluk kepada alokatur:

(1) Berdasarkan syarat-syarat ketat peruntukan anggapan s 466(1)(a) AS 2016, tiada hutang tertunggak jika jumlah yang dinyatakan dalam notis berkanun tersebut dipertikaikan secara bona fide dan atas alasan yang kukuh. Sejajar dengan itu, tiada pengabaian dalam membayar jumlah yang dituntut dan begitu juga pihak yang menuntut bayaran tidak berada dalam kedudukan pemiutang ke atas syarikat yang ingin digulung. Walaupun tuntutan berkanun adalah pra-syarat untuk menggunakan kesan anggapan ketidakupayaan untuk membayar jumlah yang dituntut, ia bukanlah keterangan prima facie tentang jumlah yang terhutang. Sama ada terdapat atau tidak jumlah yang perlu dibayar dan terhutang kepada pempetisyen perlu dibuktikan berdasarkan fakta yang tidak dipertikaikan secara serius dan jika terdapat pertikaian serius mengenai jumlah terhutang seperti yang boleh dilihat daripada afidavit yang difailkan, maka dengan jelas prosedur petisyen untuk menamatkan hutang yang dipertikaikan, di hadapan afidavit-afidavit yang bercanggah bukanlah prosedur yang sesuai untuk menyelesaikan perkara tersebut dan petisyen tersebut perlu ditolak kerana penyalahgunaan proses mahkamah (lihat perenggan 45, 51 & 54).

(2) Mahkamah akan menerima hakikat bahawa bagi kes seperti ini, majikan (responden) tidak diwajibkan untuk mengambil alih mana-mana kemudahan yang diambil oleh kontraktor (perayu). Walau bagaimanapun, di mana responden masih menikmati faedah kemudahan-kemudahan yang diambil dalam bon bayaran pendahuluan dan jaminan pelaksanaan dan terdapat beberapa keterangan bahawa responden telah menggunakan beberapa kemudahan yang diambil oleh perayu seperti yang dinyatakan dalam surat tuntutan peguam cara perayu CK Lim, Tenh & Chong yang bertarikh 27 Disember 2019 kepada responden, tidak boleh dikatakan bahawa hutang yang ingin disandarkan oleh responden untuk menggulung perayu tidak dipertikaikan atau perayu tidak mempunyai alasan dan tuntutan silang atau penolakan yang bona fide terhadap hutang tersebut dan di atas alasan-alasan yang kukuh (lihat perenggan 123).

(3) Bukan tugas mahkamah penggulungan untuk meneliti butir-butir penolakan yang telah dibangkitkan oleh perayu melalui afidavitnya untuk menentang petisyen dan menimbang dan mengambilkira kebarangkalian kejayaan bagi mengelakkan petisyen tersebut bertukar menjadi tindakan writ yang tidak akan dapat diselesaikan melalui konflik dalam keterangan afidavit. Mahkamah penggulungan harus menilai tanpa memutuskan tuntutan balas melalui proses tapisan untuk melihat sama ada tuntutan tersebut mempunyai pemberatan atau menimbulkan isu yang serius. Selagi mana penolakan, tuntutan silang atau tuntutan balas bukan fantasi sepenuhnya dan selagi ia mempunyai ciri-ciri tuntutan yang boleh dipercayai dalam konteks hutang yang didakwa dipertikaikan dan atas alasan-alasan yang kukuh, mahkamah tidak akan

selesa untuk memberikan perintah penggulungan tetapi sebaliknya akan menolak petisyen tersebut (lihat perenggan 125–126 & 130).

(4) Seksyen 410(c) AS 2016 menyatakan dengan agak jelas bahawa semua prosiding ditangguhkan dan ia juga merangkumi petisyen penggulungan. Apabila perintah pengurusan kehakiman ('JMO') dimohon tetapi sebelum perintah tersebut dibuat, akan ada moratorium ke atas semua prosiding undang-undang yang lain. Adalah agak tidak konsisten untuk mengatakan bahawa tidak akan ada perintah untuk penggulungan syarikat selepas memfailkan permohonan untuk JMO tetapi bagaimanapun semua keperluan di bawah Peraturan Syarikat (Penggulungan) 1972 berkenaan dengan pematuhan prosedur yang ditetapkan di bawah Peraturan tersebut masih boleh diteruskan. Walaupun pengiklanan dan *pewartaan* petisyen tersebut bukanlah secara spesifiknya langkah dalam prosiding, pastinya pemfailan afidavit penyampaian berkenaan dengan pengiklanan dan *pewartaan* untuk membolehkan Sijil Peraturan 32 dikeluarkan oleh pendaftar adalah 'meneruskan dengan prosiding' (lihat perenggan 131 & 137–138).

(5) Hakim yang bijaksana bimbang tentang kemungkinan penyalahgunaan permohonan JMO hanya kerana semua prosiding boleh ditangguhkan sementara menunggu pendengaran permohonan JMO. Penyelesaian bagi isu tersebut telah pun termaktub dalam s 410 AS 2016 itu sendiri di mana kebenaran untuk meneruskan permohonan boleh dipohon dan mahkamah boleh menggunakan budi bicaranya untuk memberikan kebenaran jika terdapat alasan-alasan yang kukuh untuk kebenaran tersebut diberikan dan mahkamah juga boleh mengenakan terma-terma yang dianggap wajar dalam memberikan kebenaran tersebut (lihat perenggan 139).

(6) Persoalan sama ada perayu tidak solven adalah tidak relevan jika sejak awal lagi tiada hutang yang tidak dipertikaikan yang perlu dibayar dan terhutang daripada responden. Pemiutang-pemiutang yang mempunyai hutang penghakiman atau hutang yang tidak dipertikaikan dan tulen yang berhak untuk memutuskan sama ada mereka harus menggulung perayu atau membuat perjanjian penyelesaian dengan mereka atau meluluskan atau tidak meluluskan cadangan perayu dalam permohonan pengurusan kehakiman seperti yang difailkan oleh perayu sebelum petisyen didengar. Walaupun perayu sendiri telah mengakui tentang ketidaksolvensinya dalam permohonan JMO tersebut, itu tidak menafikan prinsip bahawa hanya pemiutang untuk hutang yang tidak dipertikaikan mempunyai kedudukan undang-undang atau lokus untuk mengemukakan petisyen penggulungan (lihat perenggan 140–141 & 145).

(7) Ini adalah kes di mana selepas penamatan JVA, terdapat lebih banyak perkara daripada yang boleh dilihat dengan mata kasar berkaitan dengan

tuntutan responden dan tuntutan balas perayu. Hutang tersebut telah dipertikaikan secara bona fide dan di atas alasan-alasan yang kukuh. Mahkamah tidak boleh membuat pembacaan yang berat sebelah dan terpilih terhadap kewajipan pihak-pihak yang masih tertunggak terutamanya berkaitan bon bayaran pendahuluan dan jaminan pelaksanaan yang diperoleh perayu daripada Maybank yang belum dibatalkan. Sebagai tambahan kepada perkara di atas adalah caj yang dikenakan oleh Maybank untuk dua kemudahan di atas dan pertikaian dalam pembelian loji kuari, kenderaan dan peralatan. Selanjutnya, perkara utama bagi tuntutan balas berkenaan dengan salah nyataan yang dibangkitkan oleh perayu bukanlah fantasi sepenuhnya untuk ditolak di sini dan sekarang sebagai fiksyen, remeh dan rekaan imaginasi seseorang (lihat perenggan 154–156).]

Cases referred to

ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd [2021] 8 MLJ 99, HC (refd)

Douglas Griggs Engineering Ltd, In re [1963] Ch 19, Ch D (refd)

Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34, CA (refd)

Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd [2014] 11 MLJ 916, HC (refd)

LHF Wools Ltd, In re [1970] Ch 27, CA (refd)

Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd [2012] 6 MLJ 817, CA (refd)

Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd [2011] NSWSC 1305, SC (refd)

Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1980] 2 MLJ 53, PC (refd)

Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd [2000] 4 MLJ 657, FC (refd)

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187, CA (refd)

Mash Construction Engineering Services Sdn Bhd v Ghaz Properties Sdn Bhd [2019] MLJU 1647; [2019] AMEJ 1624, HC (refd)

Metal Reclamation (Industries) Sdn Bhd v JRC Tenaga Sdn Bhd [2000] MLJU 836; [2006] 6 CLJ 290, HC (refd)

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316, CA (refd)

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95, SC (refd)

NKM Development Sdn Bhd v Irex Sdn Bhd [1988] 2 CLJ Rep 56, HC (refd)

Nadi Bumi Resources Sdn Bhd v UI Lead Sdn Bhd [2018] MLJU 1472, CA (refd)

Ng Ah Kway v Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 58 (refd)

Pontian United Theatre Sdn Bhd v Southern Finance Berhad (Dahulunya

Dikenali Sebagai United Merchant Finance Berhad) [2006] 2 MLJ 602, CA (refd)
RHB Bank Bhd v Malaysia Pacific Corp Bhd and another appeal [2018] MLJU 103, CA (refd)
Sibu Slipway Sdn Bhd v Yii Chee Ming & Ors and other appeals [2017] 1 MLJ 368, CA (refd)
Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, FC (refd)
Top Builders Capital Bhd & Ors, Re [2021] 10 MLJ 327, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 218(1), (1)(e), (2)(a)
Companies (Winding-Up) Rules 1972
Companies Act 2016 ss 366, 368(1), 410, 410(c), 465(1), (1)(e), 466(1)(a), (1)(b), (1)(c), 475
Construction Industry Payment and Adjudication Act 2012 s 28

Appeal from: Suit No BKI-28NCC-40/6 of 2020 (HC2) (High Court, Kota Kinabalu)

Cham Ngit Shin @ Ronny Cham (Ronny Cham & Co) for the appellant.
Raymond Sze Tu Mei Thong (Carmen Khoo Jia Min with him) (Szetu & Co) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] As is so often in the business world, and the construction industry is no exception, cash is king and cash flow is critical. Often times a contractor who has done work and is not paid, would seek various means to recover payment. Some may issue a winding up notice followed by a petition to wind up.

[2] Others would proceed to commence a civil action and to obtain summary judgment for work done, and more so when a certificate of payment had been issued. Some would proceed with adjudication under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') and then thereafter, to enforce the adjudication decision as if it is a judgment of the court and many, armed with an enforcement order under s 28 of the CIPAA, would proceed with a winding up petition to recover what is presumably a debt no longer in dispute.

[3] However in this case it is the employer who is the petitioner in a construction contract, petitioning to wind up its contractor on ground that the contractor had repudiated the contract and that there is a certain sum representing an advance payment, which the employer having received it from

its principal, had passed on the contractor's portion to its contractor, the respondent in the winding up petition and the appellant here.

[4] The winding up court had agreed that there is no dispute on the fact that the advance payment had to be returned to the petitioner, as the debt is not in dispute and so a winding up order was made against the respondent below.

[5] The respondent had argued that the debt is in dispute and that the petitioner had not obtained judgment for the debt. Apparently upon the execution of a joint-venture agreement ('JVA') between the petitioner and the respondent for a Pan Borneo Highway Sabah Project, Package 6 ('the project'), the parties had agreed on a 8%:92% sharing of the contract sum of RM972,020,000 ('main contract sum') to be received from the petitioner's principal.

[6] In other words it was a total-subcontracting by the petitioner to the respondent; the petitioner would take a 8% cut and passed on the obligation and burden of executing the works to the respondent contractor.

[7] The petitioner had in turn being awarded the project by BHP Borneo Highway PDP Sdn Bhd ('BHP') as the Project Delivery Partner ('PDP'), who in turn had been awarded the project by the Government of Malaysia/State Government of Sabah, collectively referred to as the owner.

[8] It was BHP that had advanced to the petitioner a sum of RM10m under the contract between them and on 1 May 2018, the respondent requested the petitioner to advance them 92% of the advance given by the BHP to the petitioner for the costs and expenses in mobilisation, securing the advance payment bond, the performance bond or guarantee, the insurances and various other expenses necessary to start the works on the project as was the agreed arrangement under the JVA.

[9] Based on the JVA upon BHP paying the progress claims to the petitioner's bank account at Maybank, 92% of the progress payments received will be transferred to the respondent's bank account at Maybank.

AT THE HIGH COURT

[10] It is not in dispute that the sum of RM8,679,245.28 was received by the respondent from the petitioner which sum is derived from RM9.2m less the GST paid to the Royal Malaysian Custom.

[11] There is no evidence of any complaint of the works done by the respondent. The petitioner argued that it was the respondent who had on their own accord, terminated the JVA which termination the petitioner had accepted.

[12] The respondent on the other hand contended that there was much interference in the finance of the respondent by the petitioner with respect to who may receive what payment from the monies paid direct from the main contractor BHP into the special accounts of the respondent set up for the purpose of the JV contract, that made it impossible for them to continue with the JV.

[13] The respondent also argued that there was a representation from the petitioner and an understanding achieved before the termination of the JVA that the petitioner would be taking over the loans taken by the respondent from Maybank for the project, and hence the respondent agreed to exit the JV. From the documents referred to, the security for the loans taken had come primarily from an assignment of the proceeds of the JVA to the bank and the personal guarantees of the two directors of the respondent.

[14] Quite apart from that the respondent argued that there had not been a finalisation of the accounts as at the date of the termination of the JVA as the respondent had procured a performance bond from Maybank in favour of the Government of Malaysia and BHP to the tune of RM58,601,000 which is part of the facilities that the respondent had taken to finance the project. There was also evidence of an advance payment bond that the respondent had similarly obtained from Maybank.

[15] The fact that under the JVA it is the respondent's obligation to furnish this performance bond and advance payment bond, is not in dispute. There is also evidence that these Bonds are still subsisting even when the petitioner sought to wind up the respondent and at the time the winding order was made.

[16] Even at the time of arguing the appeal, the petitioner's stand is that it is for the respondent to persuade the bank to terminate the bonds. In practice and in law, no vanks may do that unless the beneficiaries of the bond had agreed with the bank as the bonds are separate and distinct contracts between the bank and beneficiaries to pay the sum agreed on demand. The one who procured the bonds cannot interfere with such a contract. It is only when it can be shown that the call on the bond would be unconscionable that an injunction may be obtained to restrain a call on the bond. See the Federal Court's case of *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1.

[17] The High Court had brushed aside the dispute raised on the misrepresentation in the context of taking over the banking facilities for the project with the respondent exiting the JVA as being too fanciful to be believed. However, it cannot be denied that in the funding of a contract of this nature, the security of the facilities for the project has been primarily the assignment of the proceeds under the JVA and once that has been terminated, there is no more funds coming from the JVA to repay the facilities.

[18] The petitioner said that BHP as the main contractor terminated the main contract with them on 22 September 2019 and that thereafter the Government of Malaysia appointed the petitioner to continue with the remainder of the project and that the petitioner is now executing the works on its own.

[19] The High Court had also held that the portion of the advance payment of the respondent had to be repaid to the petitioner upon the respondent's termination of the JVA. There does not appear to be any consideration as to whether this sum is bona fide being disputed in the light of the fact that the performance bond and the advance payment bonds procured by the respondent are still subsisting and that the facilities taken had been channeled towards the project.

[20] The respondent argued that issue of the taking over of the facilities by the petitioner is a matter that would have to be considered in a trial in answering the question as to whether there is a bona fide dispute on the debt for which the petitioner sought to wind up the respondent.

[21] If there is a taking over of the facilities with the advance payment bond and the performance bond in place there would be the need to have a fresh assignment of the contract, now between the government and the petitioner or whatever may be the security that the bank would be comfortable. The untangling of the performance bond and the advance payment bond procured by the respondent would have to be addressed as they are still subsisting.

[22] The respondent had also raised the amounts not paid by the petitioner for the equipment and machinery that the petitioner had taken over from them when the JVA was terminated.

[23] Banks being banks and here Maybank had obtained the necessary securities in the assignment of the JVA to the bank and other securities furnished by the directors of the respondent as well as the personal guarantees and indemnities for the bonds with continuing bank charges being imposed by Maybank on the respondent.

A **[24]** Indeed from the evidence before the court the bank had already commenced action against the respondent and the directors as guarantors to recover the various amounts due under the facilities taken by the respondent including the furnishing of the performance bond and advance payment bond.

B **[25]** As can be gathered from the above averments and counter-averments, often the issues surrounding the termination of a contract, and more so a construction contract, are far from clear, except in a case of a mutual termination where parties have agreed on how to wrap up pending obligations, commitments, rights and liabilities.

C

[26] Granted each case would have to be decided on its merits and the resolution of it would be fact-centric and fact-sensitive with respect to the issue of whether there is a bona fide dispute on the debt for which the petitioner seeks to wind up the respondent. This judgment written following the appeal of the respondent shall explore and deliberate on the issues raised to ascertain if the winding up here may be sustained.

[27] The parties shall be referred to as they were in the winding up proceedings below as petitioner and respondent and it is the respondent in the High Court below that had appealed to this court against the winding up order made against it.

F *Whether there is a bona fide dispute on the debt for which the petitioner sought to wind up the respondent*

[28] We cannot stress enough that while the principle is not in dispute, the application of it to the particular facts of each case may yield different results with respect to whether the respondent should be wound up. The principle plainly stated is that a winding up petition may be presented and a winding up order made on ground of the respondent's inability to pay its debt which debt is not bona fide being disputed.

H **[29]** In other words a company may be wound up for an undisputed debt or for a debt which cannot be disputed on bona fide grounds. Legally speaking, if a judgment has been obtained for a debt, then until that judgment is set aside or stayed, that debt is undisputed and should the debtor be unable to pay or compromise to the satisfaction of the creditor, a winding up petition may be presented and a winding up order obtained.

[30] Granted there is no prerequisite of a judgment having been obtained before a winding up may be commenced on ground of the debtor company not being able to pay its debt. Be that as it may, being armed with a judgment of the

court does mean that the judgment debt is not in dispute and a petition may be presented to wind up the judgment debtor company if it is unable to pay the debt.

[31] It remains however that a winding up petition is not an execution process and hence it is not contingent on the petitioner first having to obtain judgment for a debt against the respondent company. Thus, in *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 the Court of Appeal ruled that a winding up petition is not an execution of a judgment debt and therefore, there is no requirement that the debt must be a judgment debt as follows at p 198D:

> But a petition for winding up is not execution, for a winding up petition is not based upon any judgment of a court ...

[32] The device of a statutory winding up notice ('statutory notice') under s 466(1)(a) of the Companies Act 2016 ('the CA 2016') is often used because of its powerful 'deeming' effect in bringing into being a factual situation where the company is unable to pay its debt if 21 days have lapsed since the said notice is served on the company. It reads as follows:

> 466(1) A company shall be deemed to be unable to pay its debts if —
>
> (a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand by himself or his agent, requiring the company to pay *the sum due* by leaving the notice at the registered office of the company, and the company has for twenty-days after the service of the demand *neglected to pay the sum* or to secure or compound for it to the satisfaction of the *creditor*;
>
> (b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
>
> (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company. (Emphasis added.)

[33] Thus the Federal Court in *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 MLJ 657 (FC) explained that s 218(2)(a) of the CA 1965 (equivalent to s 466(1)(a) of the CA 2016) does not create separate ground for winding up but a mode of proof in support of a winding up under s 218(1) of the CA 1965 (equivalent to s 465(1) of the CA 2016) at p 668 G-H as follows:

A ... It should however be borne in mind that s 218(2)(a) does not create separate grounds for winding up, but provides a mode of proof available in aid of an application seeking a winding up on the ground specified in s 218(1), vis that the company is unable to pay its debts ...

B **[34]** In a case where the statutory notice above is not utilised, the petitioner creditor is at liberty to invoke the deeming provision if it could prove either s 466(1)(b) or (c) above. It is not often used as the use of a statutory notice is a more objective means of establishing the inability of a company to pay its debt as the expiry if the 21 days is an objective fact and the only other requirement C to satisfy is that the debt must be one due to the creditor.

[35] If for some reason the statutory notice is defective whether with respect to service of it or the filing of the petition before the 21 days have expired, the petitioner may still rely on s 466(1)(b) or (c) if it has so pleaded in the petition D and set out the facts in support of the application of s 466(1)(b) or (c) and if the court is so satisfied that its requirements have been fulfilled.

[36] Section 466(1)(a) of the CA 2016 is identical to the previous s 218(2)(a) E of the CA 1965. Therefore, cases within our jurisdiction and that of other jurisdictions dealing with the same identical provisions would be relevant even though in our jurisdiction, they were cases under the CA 1965.

[37] The bulk of the winding petitions filed in the High Court and the F winding up order subsequently made are on the ground of the company been unable to pay its debts under s 465(1)(e) of the CA 2016 (s 218(1)(e) of the CA 1965) and after 21 days' notice has been served under s 466(1)(a) of the CA 2016 (s 218(2)(a) of the CA 1965).

G **[38]** It remains a potent weapon for recovery of a genuine debt which cannot be disputed for winding up has serious consequences on the company — the directors are rendered functus upon an order being made, contracts of the company including employment contracts would be terminated unless affirmed by the liquidator, banks would be freezing the banking facilities of the H company and generally no payments may be made out other than via the liquidator and for a valid purpose. Debtors of the company in liquidation would also take the opportunity to withhold payments due.

[39] Therefore to put a company into liquidation for a disputed debt on I bona fide grounds would be an abuse of the court's process and a grave injustice to the company.

[40] Here the statutory notice was served on the respondent on 4 February 2020 and the winding up petition was filed on 15 June 2020.

[41] Section 465(1)(e) of the CA 2016:

> 465(1) The Court may order the winding up if —
>
> (e) the company is unable to pay its debts;

[42] The definition of 'inability to pay debts' is found in s 466(1)(a) of the CA 2016 and it is a sine quo non that the debt must in a sum that is due and the sum cannot be said to be due if it is bona fide being disputed. The procedure of a petition where matters are decided on affidavit evidence is eminently unsuitable to resolve the issue of a disputed debt.

[43] In *Ng Ah Kway v Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58, Shankar J (as he then was) held that a petition to wind up a company is a serious matter as it affects the reputation of the company. The debt must be liquidated and undisputed. The petition cannot be resorted to settle disputed debts. The proper course for the petitioner is to file a civil suit for determining the disputed claims.

[44] The same sentiment and stricture was sounded by VC George J (as he then was) in *NKM Development Sdn Bhd v Irex Sdn Bhd* [1988] 2 CLJ Rep 56 at p 59 as follows:

> I was more than satisfied that the alleged debt on which the petition was founded was *disputed and on substantial grounds*. I was of the opinion that the petition must fail for the same reasons that Megarry J gave for coming to a similar conclusion in the case of *Re Lympne Investments Ltd* [1972] 2 All ER 385 where he said on p 388 line i:
>
> > It therefore seems to me that this petition must fail. A real dispute, turning to a substantial extent on disputed questions of fact which require viva voce evidence, and involving charges of fraud or near fraud, cannot properly be decided on petition. Nor is it right, or in accordance with the modern practice, to stand over the petition in order that the disputed issues may be resolved in other proceedings. That practice, I may say, seems to stem from *Re London & Paris Banking Corp*. *The companies court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation*, or to be kept in suspense over the company's head while that litigation is fought out. Further, *Mann v Goldstein*, cited with approval in the New Zealand Court of Appeal in *Bateman Television Ltd v Coleridge Finance Co Ltd*, provides authority for saying that *when a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a 'creditor'* within s 224(1) of the Companies Act 1948 who has the locus standi requisite for the presentation of the petition, even if the company is in fact insolvent. Again, the existence of a dispute on substantial grounds as to the existence of any debt defeats the contention that Lympne has, within the meaning of s 223(a), 'neglected' to pay the sum required by the

A statutory notice: see *Re London & Paris Banking Corp*. In the context of a notice requiring a person to do some act, *I do not see how it can be said that the person 'neglects' to do that act if the reason for not doing it is a genuine and strenuous contention, based on substantial grounds*, that the person is not liable to do the act at all. If there is liability, a failure to discharge that liability may well be 'neglect' whether it is due to inadvertence or obstinacy or dilatoriness; but a challenge to liability is a challenge to the foundation on which any contention of 'neglect' in relation to an obligation must rest. All these considerations point in the same direction, and accordingly I dismiss the petition. (Emphasis added.)

[45] Therefore going by the strict requirements of the deeming provision of s 466(1)(a) of the CA 2016, there is no debt due if the sum stated in the statutory notice is being disputed bona fide and on substantial grounds. There is also correspondingly no neglect to pay the sum demanded and likewise the party demanding payment does not stand in the position of a creditor with respect to the company that is sought to be wound up.

[46] Merely saying that the debt is being disputed would not be sufficient to resist a winding up order for after the petitioner has filed its affidavit verifying the various averments as to how the debt had arisen and become due and owing, the respondent would need to rebut those allegations or show that the debt is seriously and substantially being disputed and the evidence and reasons in support of the dispute.

[47] Thus our Supreme Court in the case of *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 emphasised that the court must consider all evidence and determine whether it should exercise its discretion to order winding up or not:

> The appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding-up or not.
>
> Relevant to this appeal is that part of the judgment in *Chip Yew Brick Works Sdn Bhd* [1988] 2 MLJ 447 which appears at pp 448 and 449:
>
> > Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a bona fide dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

[48] In *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817 at p 823 the Court of Appeal observed as follows:

> ... in order to oppose a winding up petition, the respondent must raise a bona fide dispute in both a subjective and objective sense. It must be honestly believed to exist and must be based on substantial or reasonable grounds ...

[49] For a more recent restatement of the same principle, we can refer to the dicta of the Darryl Goon J (now JCA) in *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2021] 8 MLJ 99, as follows:

> [36] In the case where the debt is genuinely disputed on substantial grounds, *the basis is said to be that that it is a pre-requisite of the legislation, in the present case ss 465(1)(e) and 466(1)(a) of the Companies Act 2016, that there exists a debt before a court may order the winding up of a company* (see *Mann and Another v Goldstein and Anor* [1968] 2 All ER 769 at p 775). A debt that is genuinely disputed on substantial grounds is not established as a debt. In addition, winding up petitions have never been regarded as a suitable means to decide the validity or otherwise of disputed debts. As Kekewich J observed in *New Travellers' Chambers, Ltd v Cheese and Green* (1894) 70 LT 271 at p 272:
>
> > Of course, the question whether this is a debt or not may possibly be tried by a winding-up petition; but it has been said over and over again, that the presentation of a winding-up petition is not a convenient, and often not a proper method of trying a disputed debt. If there is any reasonable ground for disputing the existence of the debt — if the question is not a mere question of quantum, but whether there is in fact a debt or not — a petition ought not to be presented, and therefore the court ought to restrain the presentation of the petition. (Emphasis added)
>
> See also the observations of Sir James Bacon VC in *Re Gold Hill Mines* (1883) 23 Ch D 210 at pp 211–212 and that of Sir George Jessel MR in *Niger Merchants Co v Capper* (1877) 18 Ch D 557 at p 559 cited in *Fortuna Holdings* by McGarvie J.
>
> [37] Clearly, in respect of disputed debts, there may be substantial dispute of material facts requiring the attendance of witnesses. In such circumstances, the dispute would be more appropriately tried by way of a writ action rather than a petition. Till today, the procedure for winding up a company is still by way of a petition. (Emphasis added.)

The statutory notice

[50] The statutory notice demanding for payment of a 'debt' in the sum of RM8,679,245.28 was issued by Messrs Szetu & Co, solicitors for the petitioner. See encl 5 p 95. The material parts of the said statutory notice read as follows:

> We write on behalf of Pembinaan Azam Jaya Sdn Bhd.
>
> We have instructions from our client to state that pursuant to your tax invoice no. KLSB-026/05/18 dated 01.05.2018, our client had on 05.06.2018 remitted a total sum of RM9.2 million to your company and for your account, *being the advance payment for the Pan Borneo Highway, Sabah @ Putatan-Inanam Road (Work Package 6) in the sum of RM8,679,245.28* and goods and service tax of RM520,754.72.
>
> *Following your surrender of works under the Joint Venture Agreement dated*

14.12.2017, you are now liable to return the said advance payment of RM8,679,245.28 to our client.

We have instruction from our client to and DO HEREBY DEMAND that you repay the said sum of RM8,679,245.28 (excluding the goods and services tax) to our client within 21 days from the receipt of this Notice. (Emphasis added.)

[51] Whilst the statutory demand is a pre-requisite for invoking the deeming effect of an inability to pay the sum demanded, it is not prima facie evidence of a debt owing. Thus, in the case of *Nadi Bumi Resources Sdn Bhd v UI Lead Sdn Bhd* [2018] MLJU 1472, the Court of Appeal explained as follows:

[24] At this juncture we say that the claim under the s 218 notice is pre-mature. Until and unless the petitioner obtains a judgment in Civil Suit 22NCVC-2–1 of 2016 for the amount of RM351,889.60 which is the very same claim in this petition, only then can the petitioner be classified as a creditor against the respondent. *It is trite law that, in a winding up petition, it is pertinent that, the actual claim/proof of debt by the petitioner be made out as the s 218 notice per se is insufficient to be evidence of a debt.* The notice under s 218 is merely a notice of demand for the purpose of invoking the presumption that the respondent is unable to pay its debts. *It is still incumbent on the petitioner to prove that it is a creditor and that the sum stated in the notice is due and owing*, as held in the case of *Metal Reclamation (Industries) Sdn Bhd v JRC Tenaga Sdn Bhd* [2000] MLJU 836; [2000] 6 CLJ 290 as follows:

(1) *A statutory notice under s 218(2)(a) of the Act cannot be said to be prima facie evidence of the debt. It is nothing more than a letter of demand* sent to invoke the presumption of inability to pay debts and its function is to warn the debtor of an impending petition.

(2) A petitioner will still have to prove that it is a 'creditor' and that the sum so stated in the notice is owing and due.

(3) Once a debt, not being a judgment debt, is disputed, a creditor has no right to petition and this is so even if the company is insolvent.

(4) *A winding up petition is not a legitimate means of seeking to enforce a payment of debt which has not been clearly determined. Otherwise, the courts which hear winding up petitions would first have to establish the debt and this will put the courts to unnecessary strain if a petition to wind up is based not upon a judgment debt but purely on a s 218(2)(a) notice.* (Emphasis added.)

[52] In *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34 the Court of Appeal reiterated as follows:

It must be emphasised that the debt must be presently due and owing (*Re Bryant Investment Co Ltd* [1974] 2 All ER 683). And the debtor has 21 clear days (three weeks) to pay and that would exclude the day of service (*Re Lympne Investments Ltd* [1972] 2 All ER 385). A note of warning must be sounded. *That a statutory notice under sub-s (2)(a) of s 218 of the Companies Act 1965 cannot be construed to be prima facie evidence of the debt* (*Metal Reclamation (Industries) Sdn Bhd v JRC Tenaga Sdn*

Bhd [2000] MLJU 836; [2000] 6 CLJ 290). (Emphasis added.)

[53] The case of *Metal Reclamation (Industries) Sdn Bhd v JRC Tenaga Sdn Bhd* [2000] MLJU 836; [2006] 6 CLJ 290 (HC) referred to above had held as follows:

> In *In re Ban Hong Co Ltd* [1959] 1 MLJ 100 it was held that a petition instituted for the purpose of enforcing a disputed debt is an abuse of process of the court and will be dismissed with costs. Rigby J said (at p 103):
>
> > It is well settled law that a winding-up petition is not to be used as machinery to try a common law action, and that the presentation of a petition for winding-up simply with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs.
> >
> > I would agree with the views of Rigby J. A winding up petition is not a legitimate means of seeking to enforce payment of a debt which has not been clearly determined otherwise the courts, *when faced with a winding-up petition on a debt which is not based upon a judgment debt, would first have to establish the debt due, viz., whether the alleged debt claimed is the actual amount owing based on the evidence available*. (Emphasis added.)

[54] Whether or not there is a sum due and owing to the petitioner would have to be proved based on facts not seriously in dispute and if there are serious disputes on the sum due as gleaned from the affidavits filed, then clearly the procedure of a petition to wind up a disputed debt, in the face of conflicting affidavits would not be suitable procedure to resolve the matter and the petition would have to be dismissed as being an abuse of the court's process.

The disputes of the sum claimed

[55] In the winding up petition exhibited at pp 102–108 of encl 5, the relevant facts as averred by the petitioner are as follows:

> 7. The routes of the Pan Borneo Highway across Sabah (hereinafter, 'the Pan Borneo Highway (Sabah)') are to be implemented jointly by the Government of Malaysia and the State Government of Sabah (hereinafter, 'the Owner').
>
> 8. The Owner appointed Borneo Highway PDP Sdn Bhd (hereinafter, 'BHP') as their project delivery partner to implement, supervise, manage and deliver the Pan Borneo Highway (Sabah).
>
> 9. On 27.07.2017, the Petitioner submitted a tender to BHP for the construction of a section of the Pan Borneo Highway (Sabah) from Putatan to Inanam, which is identified as 'Package 6' (hereinafter, 'the Project').
>
> ...
>
> 11. On 11.12.2017, by way of a Letter of Acceptance, BHP awarded to the Petitioner a contract to carry out works under the Project.'

A ...

13. On 14.12.2017, the Petitioner and the Respondent entered into a Joint Venture Agreement (hereinafter, 'the JVA') to implement and carry out the Project. The JVA was executed by the parties in Kota Kinabalu. A copy of the JVA is annexed as 'D'.

B 14. Under the JVA, the Petitioner appointed the Respondent as their joint venture partner to discharge the Petitioner's obligations under the BHP Contract for a contract sum equivalent to 92% of the contract sum of RM972,020,000.,00 awarded by BHP to the Petitioner (the 92% is hereafter referred to as 'the Respondent's Entitlement').'

C ...

16. *BHP has made an advance payment in the sum of RM10 million to the Petitioner's non-checking account* No. 508029527161 with Maybank.

17. *On 01.05.2018, the Respondent requested for an advance payment for the Project in*
D *the sum of RM8,679,245.28 and good and service tax of RM520,754.72 (a total sum of RM9.2 million).* A copy of the Respondent's invoice no. KLSB-026/05/18 dated 01.05.2018 (hereinafter, 'the said Invoice') is annexed as 'E'.'

...

E 21. *On 25.07.2019, the Respondent served a notice on the Petitioner at Kota Kinabalu, informing the Petitioner that they would no longer fulfil their obligations under the JVA and would immediately cease all ongoing works and operation. The Respondent's decision to cease works and operation is a repudiation of the JVA.* A copy of the Respondent's letter dated 25.07.2019 is annexed as 'G'.

F 22. *The Petitioner by a letter dated 23.08.2019 accepted the Respondent's above repudiation of the JVA.* A copy of this letter was served on the Respondent's director, Encik Ghazali Bin Abdul Halim, at the Petitioner's office at Kota Kinabalu. A copy of the Petitioner's letter dated 23.08.2019 is annexed as 'H'.

G 23. *At the time when the Respondent repudiated the JVA, the above-mentioned advance payment in the sum of RM8,679,245.28 had not been repaid to the Petitioner and is still outstanding.*

24. *As a result of the Respondent's repudiation of the JVA and their cessation of works and operation under the same, the Respondent is now liable to repay the advance in the sum*
H *of RM8,679,245.28.*

25. By a statutory notice of demand dated 03.02.2020 (hereafter, 'the Statutory Demand'), the Petitioner demanded the Respondent to repay the advance payment of RM8,679,245.28 (excluding the goods and services tax) within 21 days from the receipt of the Statutory Demand. A copy of the Statutory Demand is annexed as 'I'.

I 27. The Respondent has since the service of the Statutory Demand failed to respond and filed to make any effort and neglect to repay the sum or any part thereof. As at the time of the filing of this Petition, the sum of RM8,679,245.28 remains due and owing to the Petitioner.

28. By reason of the above matters, the Respondent is unable to pay its debts pursuant to section 465(1(e) read together with section 466(1)(a) of the Companies Act 2016. (Emphasis added.)

[56] The learned judge noted as follows with respect to the allegation of the debt owing as referred to in paras 23–24 of the petition in his grounds of judgment ('GOJ'):

[35] In this judgment I need to emphasis that *respondent did not deny above paras 23 and 24 of the petition namely that the repayment of the advance is outstanding and liable to repay the same in their affidavit to oppose the petition.* This fact must be deemed to have been accepted. *The respondent* however at para 6 of their affidavit in opposition (encl 34) *disputes that the sum demanded on the basis that they are claiming substantial set offs against these advances.* The other ground for denying the debt demanded by the Petitioner is not a judgment debt. (Emphasis added.)

[57] At this stage perhaps it would be apposite to refer to the Privy Council case from Singapore, *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 where at p 55 is was observed as follows:

There is no distinction in principle between a crossclaim of substance (such as in the *Wools* case) and a serious dispute regarding the indebtedness imputed against a company, which has long been held to constitute a proper ground upon which to reject a winding up petition.

[58] A state of affairs upon the termination of a construction contract may not always be as simple and straightforward as it is painted to be. There are often the obligations of the parties to unentangle and resolve.

[59] There is more than meets the eye as would be seen in the various issues raised below by the respondent. A selective disclosure of the facts so as to create a simple and straightforward liability to pay a debt and glossing over unresolved issues in the wake of a termination of a construction contract may well be flowing from a suppression of material facts and with that, an abuse of the court's process as was observed in *Sibu Slipway Sdn Bhd v Yii Chee Ming & Ors and other appeals* [2017] 1 MLJ 368 at para 23 as follows:

The issue of material non-disclosure or suppression of material facts in the course of court proceedings is of fundamental importance in the administration of justice. It is not possible for this court to gloss over facts that disclose deliberate attempts to mislead the court into granting the winding up orders. Apart from causing prejudice to the respondents, and breaching the rules of natural justice, these acts or omissions amount to an abuse of process of the court.

The advance payment issue

[60] The true nature of the advance payment under the JVA appears to be in dispute. To begin for the works in any project and especially a highway project of this scale, there would of course be the preliminary costs to be incurred which would be the mobilisation and transportation costs, the procuring of the advance payment bond and performance bond or guarantee, the appointment of consultants and engineers, environmental surveys and reports, insurances and the such. These all have to be expanded before even the first progress billing can be issued for work done.

[61] It cannot be seriously disputed that this advance payment bond was procured by the respondent as part of their obligation under the JVA.

[62] In the letter of acceptance dated 11 December 2017 from BHP and accepted by the petitioner with respect to the project for the contract sum of RM917,000,000 it is provided in para 6(b) as follows:

> (b) In the event advance payment is applicable, you are also required to submit an on-demand Banker's Guarantee for Advance Payment issued by an approved licensed bank incorporated in Malaysia and acceptable to the PDP no later than thirty (30) days from the date of this Letter of Acceptance. The Banker's Guarantee for Advance Payment shall be assignable to the Government of Malaysia.

[63] There is no evidence from the petitioner that it had itself furnished the said advance payment guarantee from the bank. Under the scheme of the JVA, all financial obligations with respect to the project are to be borne by the respondent including under cl 6.1(vi) the cost and expense for the necessary bank guarantee required for the works. From the documents exhibited by the respondent this advance payment bond exhibited in LAK1 in the respondent's affidavit to oppose the petition is part of the portfolio of facilities obtained for the financing of the project.

[64] The petitioner by its letter dated 28 May 2020 in response to the invoice sent out by the respondent denying liability to pay the sum of RM148,000 being the commission that the respondent had to pay its bank for the issuance of the advance payment bond, had impliedly accepted that the advance payment guarantee was procured by the respondent.

[65] A more explicit reference to the fact that this advance payment bond was procured by the respondent is found Messrs Szetu & Co's letter dated 3 January 2020 to Messrs CK Lim, Tenh & Chong whereby in stating that they acted for the petitioner, further made reference to the advance payment bond and the performance bank guarantee in the caption to the said letter and further stated as follows:

> Our view is that notwithstanding Liziz's termination of the Joint Venture Agreement, the retention of performance bond and guarantee by the BHP or the Government of Malaysia ('the Beneficiaries') is a matter between the issuing Bank and the Beneficiaries. We have no control over what the Beneficiaries decide to do with them.
>
> ...
>
> We respectfully say that the proper party to seek the return or the cancellation of the performance bond and guarantees from the Beneficiaries is the issuing Bank.

[66] As to whether this advance payment is captured in the progress billing for works done or that it is progressively being deducted with each payment of the progress billing is far from clear; the certificate of payment issued being only interim in nature. Only one certificate of payment was exhibited which is interim payment certificate No 16.

[67] There is some indication that the advance payment shall be deducted from each progress payment as indicated in cl 4 of the advance payment guarantee as follows:

> The said sum [of RM10 million] which we guarantee to pay the PDP shall be reduced automatically in proportion to deduction made by the PDP out of the progress payments due to the Works Package Contractor for repayment of the advance payment so made.

[68] There is no indication that BHP has called on its works package contractor in the petitioner to make a refund of the advance payment. Learned counsel for the petitioner had submitted in para 2 of his written submission that under the main contract, the respondent was entitled to receive an advance of RM10m from BHP. This advance sum will be recovered by BHP by way of deducting future progress claims by the respondent for work carried out under the main contract until full repayment.

[69] The respondent argued that there was not only no provision in the JVA providing that the advance payment is to be returned to the petitioner upon default or repudiation but that the omission was deliberate and purposeful. Moreover, this is a matter that can only be resolved at trial in a civil suit as the respondent has the continuing exposure to liability in the advance payment bond and the performance bond that it has procured in favour of BHP and the owner as required under the JVA.

[70] The respondent argued that it had contracted on the basis that there was no obligation to return the advance payment of RM8,679,245.28 as it still has the continuing exposure to this sum to the bank that had furnished the bond with security placed by it with the bank. With everyone not budging from the

safe position they have taken, it is the respondent that remains exposed to liability under the advance payment bond.

[71] In such a case, for a full and final resolution of the dispute, the repayment of the advance payment would have to come with the release of the advance payment bond from the bank which can only happen if BHP or the Government of Malaysia agree (assuming the bond has been assigned to the Government of Malaysia upon the subsequent termination of the contract between BHP and the petitioner).

[72] The learned High Court judge had referred to the proposition that the very nature of an advance payment is that it has to be repaid and reference was made to the case of *Mash Construction Engineering Services Sdn Bhd v Ghaz Properties Sdn Bhd* [2019] MLJU 1647; [2019] AMEJ 1624.

[73] That was a case where the parties had entered into a JVA and there was also an agreement that the plaintiff shall contribute RM200,000 as initial funding for the project and the agreement was that the parties shall share the net profit equally between the parties. Later as the defendant was insolvent, the plaintiff had to make further advances before the project was cancelled by their main contractor. A post-dated cheque was also issued by the defendant to the plaintiff for the sum of RM1,208,600 as a full and final settlement for the advance payment made by the plaintiff. However, the cheques was dishonoured upon presentation.

[74] It was against such a factual matrix that the High Court granted judgment to the plaintiff for the sum claimed after a full trial where witnesses were called.

[75] Clearly the facts are materially different from the instant case where the advance payment bond, being irrevocable is still subsisting and susceptible to being assigned by BHP to the Government of Malaysia. Indeed cl 6 of the advance payment bond does provide that the benefits or rights under the guarantee may be assigned by BHP to the Government of Malaysia with written notification to the bank and to the works package contractor who is the petitioner here.

[76] There is at the moment nothing preventing BHP or the Government of Malaysia as the case maybe, from calling on the advance payment bond when at the appropriate time the call is made in the event that this advance payment has not and cannot be recouped.

[77] Unfortunately there are more questions raised than there are answers provided and the sum claimed is far from being clear for so long as the advance payment bond has not been cancelled and is still subsisting.

The performance bond issue

[78] There was also the issue of the performance guarantee to the tune of RM58,601,000 procured by the respondent from Maybank in favour of the Government of Malaysia/BHP as required under the JVA. The respondent averred that this performance guarantee had not been replaced with a fresh performance guarantee to be furnished by the petitioner since the JVA had already been terminated and the petitioner had accepted the termination.

[79] Without the release of the respondent from its exposure to liability under the performance guarantee, the respondent would not be able to terminate this facility in the performance guarantee, not to mention that the security furnished for this facility cannot be released and on top of that there would be charges involved for which the bank had already charged the respondent RM2,119,003.60.

[80] After all the obligation of the respondent under the JVA in cl 6.1(vi) is unambiguous as follows:

> Liziz shall at its own cost and expense arrange for the necessary bank guarantee for the performance bond required for the Works and immediately upon its issuance, Liziz shall deliver the same for its transmission to PDP as may be required under the Contract Agreement and within the time period stipulated therein and which shall be subject to the terms and conditions relating thereto in the Contract Agreement. Any securities in whatever form or manner provided by Liziz to the financial institutions) to procure the issuance of the aforesaid bank guarantee and/or performance bond shall be and remain the absolute property of Liziz.

[81] The respondent said that it would have to charge this to the petitioner who to this day is benefitting from it as, according to the petitioner, BHP also ran into problems subsequently and now the owner of the project had entered into a direct contract with the petitioner to complete the project.

[82] When the petitioner received the respondent's invoice of RM2,119,003.60 being the performance guarantee commission from 26 July 2019 to 24 February 2024 (the expiry date of the performance guarantee), the petitioner replied through its solicitors Szetu & Co by its letter of 28 May 2020 stating that the respondent should look to the issuing bank Maybank to seek the return or the cancellation of the performance guarantee and that the

petitioner is not responsible for any payment of the commission charged as a result of the respondent's failure to seek the return or cancellation of the performance guarantee.

[83] It is trite that as the performance guarantee is a contract between Maybank and the Government of Malaysia/BHP as beneficiaries, it cannot be terminated without the consent and approval of the beneficiaries.

[84] The petitioner averred that following the Government of Malaysia's termination of the contract with BHP, the Government of Malaysia then directly appointed the petitioner to carry out the project works. The petitioner further averred that at para 3(a) of the government's award dated 2 December 2019, the petitioner had the option of either issuing a performance bond or alternatively allow retention of monies from their progress claims.

[85] The petitioner then went on to explain that it had elected not to issue a performance bond and instead allowed deduction from their progress claims to be retained by the government. It produced a copy of its letter to the Director of Public Works dated 28 January 2020 electing to allow a retention sum in lieu of issuing a performance bond.

[86] The petitioner maintained that it is incorrect for the respondent to claim that the petitioner is still utilising the performance guarantees and that the petitioner is obliged to replace the same.

[87] However para 3(a) of the government's award letter does not give the petitioner such an option. The option is that of the government to enforce a money guarantee performance approach. It reads in the original language as follows:

> 3. Tarikh milik tapak seperti yang disebutkan dalam Syarat-syarat Kontrak ialah pada 3 Disember 2019. Walau bagaimanapun, tuan adalah diingatkan bahawa tiada kerja boleh dibuat melainkan jika tuan telah mengemukakan kepada Kerajaan dokumen-dokumen berikut:
>
> > (a) bon pelaksanaan yang masih sahlaku dan tidak boleh dibatalkan, dan pihak yang dinamakan di dalam Jaminan adalah di antara pihak Kerajaan dan Penjamin sahaja, dan jikalau Bon Pelaksanaan gagal dikemukakan pada tarikh milik tapak, Kerajaan berhak untuk melaksanakan kaedah Wang Jaminan Pelaksanaan;

[88] The option is that of the government to elect on a money guarantee performance approach and it is not an option which the petitioner may elect.

[89] Even if the above para 3(a) may be interpreted to be an alternative proposal for the petitioner to suggest, there is no evidence that the government had accepted the proposal. With the performance guarantee of Maybank in favour of the government procured by the respondent and still subsisting or at least not revoked, there is no incentive for the petitioner to do everything possible to release the respondent from this exposure to liability and risk.

[90] Assuming for a moment that the government had exercised the option of deducting a certain percentage of each progress certificate payment for the purpose of the performance guarantee, there is still no good reason for the performance guarantee of Maybank in favour of the Government of Malaysia/BHP not to be revoked.

[91] According to the respondent, the petitioner had made no attempt to-date to replace the said performance guarantee. It is true that the petitioner had conveniently left this benefit of the performance guarantee out until it was raised by the respondent. Whether it be a case of selective amnesia or a strategic presentation of the facts as perceived by it to convince the winding up court that there is no dispute on the sum claimed, these are matters best left for trial.

[92] The more the petitioner tried to explain away the performance guarantee obligation of the respondent which is still subsisting, the more obvious it becomes that the sum claimed in the advance payment is far from being undisputed and indisputable. What has now come to the fore is that the petitioner is trying to sidestep the issue and to wash its hands clean of its obligation where the continuing benefit seems to be enjoyed by it.

[93] This 'nothing to do with me approach' is palpable when in para 15 of its affidavit in reply it proffered a solution in an attempt to square a circle as follows:

> That the dispute over the return of the Performance Guarantee is in fact one between the issuer of the Performance Guarantee, namely Malayan Banking Berhad (hereinafter referred to as 'the Bank'), and BHP and the Government who had refused to return the same to the Bank notwithstanding the termination of the Contract between the Government and BHP (hereinafter referred to as 'BHP Contract').

[94] This practice of shifting blame to others in an attempt to deflect from owning one's responsibility is as old as Adam and Eve for it was recorded when God asked Adam whether he had eaten the forbidden fruit, he blamed it on Eve in this fashion: 'The woman *you* put here with me — *she* gave me some fruit from the tree, and I ate it'. (Emphasis added.) Eve, when confronted by God, blamed it on the serpent: 'The serpent deceived me, and I ate'. As for the serpent, it has no one else to blame and ended up with no legs to stand on!

[95] It is more a tongue-in-cheek answer for there is no sentimental value in a performance guarantee for so long as the petitioner can furnish another to the Government of Malaysia, there does not appear to be any cogent reason why the Government of Malaysia as the beneficiary cannot release performance guarantee provided by Maybank but procured by the respondent.

[96] To complicate matter further BHP had purportedly assigned the benefit of the performance guarantee and the advance payment guarantee to the Government of Malaysia effective 22 September 2019 and that the bank had written to BHP through its solicitors to state that such an assignment is ineffective.

[97] However the Government of Malaysia is especially coy about it and in fact, the beneficiaries under the performance guarantee are the Government of Malaysia and BHP as can be seen in the performance guarantee exhibited as LAK1 in the respondent's affidavit to oppose the petition and the said guarantee is addressed by Maybank to both the Government of Malaysia and BHP.

[98] In any event cl 5 of the performance guarantee states as follows:

> 5. If the appointment of PDP is terminated by the Federal Government, the Guarantor acknowledges and. agrees that all the benefits and rights under this Guarantee (including the right to make a demand on this Guarantee) may be assigned in whole by the PDP to the Federal Government with written notification to the Guarantor and the Works Package Contractor.

[99] The position is not altogether clear with cl 8 providing as follows:

> The Guarantor shall not be discharged or released from this Guarantee by any arrangements between the Works Package Contractor and the PDP with or without the consent of the Guarantor or by any alteration in the obligations undertaken by the Works Package Contractor or by any forbearance, whether as to payment, time, performance or otherwise.

[100] Banks being banks, Maybank would take and have taken the safest position by suing the petitioner for the whole of the facilities taken for the project including the performance guarantee and advance payment guarantee.

[101] After all the performance guarantee is an on-demand guarantee to pay under cl 1 thereof an amount not exceeding RM48,601,000 upon demand by the Government of Malaysia or BHP, stating that the petitioner has failed to perform the obligations under the contract between BHP and the petitioner for the said project. The bank issuing a performance guarantee would have its

reputation to protect and to honour its commitment to pay once a demand is made pursuant to the performance guarantee.

[102] By cl 4 thereof the performance guarantee is stated to be a continuing guarantee and to be irrevocable and shall initially remain in force and effect from 15 January 2018 until 14 January 2024.

[103] For the moment it would appear that this particular obligation of the respondent under the JVA has not been resolved even though the JVA has been terminated.

Sale of quarry crushing plant and vehicles issue

[104] The respondent contended that it has a crossclaim against the petitioner for the sum of RM1.5m being the outstanding sum of the quarry crushing plant and vehicles sold by the respondent to the petitioner on 12 August 2019.

[105] The respondent exhibited a letter written to the petitioner dated 12 August 2019 setting out the items on the quarry crushing plant that were sold together with the vehicles. There was also an unsigned sale and purchase agreement prepared and exhibited with further details of the crusher and vehicles sold.

[106] These are the crusher and vehicles used by the respondent at chainage 1600 for the project and it is not too far fetched for it to be sold to the petitioner if it is continuing with the project as it said it is. Upon the termination of a constriction contract it is often a practice of the employer to require the contractor to leave everything behind unless permitted by the employer to remove and a valuation would be done on the raw materials, equipment and machinery that the employer would want to take over so as to be able to continue with the remainder works seamlessly and smoothly with as little disruption and loss of time as possible.

[107] In any event this is a matter that can only be finally determined at the trial and not by way of a petition based as it is only on conflicting affidavits' evidence.

The misrepresentation of the petitioner in taking over the banking facilities of the respondent for the project

[108] The respondent had stated that it had agreed with the petitioner to terminate the JVA because of the petitioner's interference in the financial affairs

of the respondent with respect to the payments out from the accounts opened with the bank for the receipt of monies from the interim certificates issued for the project.

[109] The respondent said that letter of repudiation of the JVA was drafted by Mr Raymond Szetu of Messrs Szetu & Co, the solicitors for the petitioner.

[110] Soon after the termination of the JVA, the respondent had, through its solicitors CK Lim, Tenh & Chong written to the petitioner by their letter 27 December 2019 to make a demand on the losses it suffered because of the misrepresentation by the petitioner on the termination of the JVA. The misrepresentation was that the petitioner would take over the banking facilities for this project from the respondent with the primary security being the contract between BHP and petitioner as the JVA would be terminated as agreed. This was before the filing of the petition on 15 June 2020.

[111] The allegations made in the said letter were as follows:

> 1. On or about the 25.7.2019 you have during the negotiations, in order to induce Liziz to terminate the JVA, made the following representations to Liziz that:
>
> (a) Upon the termination of the JVA you have agreed with Maybank to take over the banking Facilities above from Liziz;
>
> (b) By you taking over the above Banking Facilities you have agreed to take over all the existing benefits and liabilities of Liziz of the said Facilities;
>
> (c) Upon taking over of the above Banking Facilites which included Liziz's Term Loan (Simgood's Account) amounting to RM35,000,000, you will also assume and take over this liability under the said arrangement.
>
> 2. Induced by and acting in reliance upon the said representations, Liziz was compelled to sign the Termination of the JVA. In this regard, our client Liziz, categorically denied your assertion that they were unable to continue with their JVA's obligations and henceforth request for the repudiation of the said JVA.
>
> 3. Recently Liziz have been informed by Maybank that you have now refused to accept the said Banking Facilities from Maybank. As a result of the above matters set out, our client now discovered that your representations were untrue and misleading. As a result of your refusal to accept the said Banking Facilities, our client has now suffered loss and damages, being the sums outstanding under the said Facilities and others ...

[112] The sums claimed against the petitioner are as follows:

(a) Current outstanding balance as at 30 November 2019.	RM110,000,000

(b)	Amount of money drawn/utilized by Azam under the said banking facilities as at 30 November 2019.	RM90,000,000
(c)	Loss of credit advancement: Simgood's term loan	RM35,000,000
(d)	Performance bond & BG — Upon 50% completion of project to be released to Liziz	RM48,601,000
	Total loss/damages	RM283,601,000

[113] This court is of course not mesmerised by the colossal sum that the respondent is claiming against the petitioner. Whether or not this misrepresentation is true would be a matter for proving in a writ action. For so long as it is not too fanciful, the facts would have to be ferret out in a writ action.

[114] As disclosed by the petitioner in its further affidavit dated 30 October 2020 the respondent had in its Ipoh High Court's JMO application stated that arising out of Maybank's claim against it for default on the facilities taken, the respondent had in turn made a third party claim for contribution and indemnity against the petitioner for the sum of RM110m.

[115] For the moment we see that the two facilities in the advance payment bond and the performance guarantee are being enjoyed by the petitioner who has now been appointed by the Government of Malaysia to continue with the remainder works of the project. By the respondent's solicitors' letter of 26 December 2019 to the petitioner, the petitioner was reminded as follows:

> We have been informed by Liziz that you have intentionally declined the offer by Maybank to take over Liziz's existing Facilities in respect of the above Project. As the JV Agreement for the above Project has been terminated, you are no longer entitled to use Liziz's above two bonds. We have our client's instructions to demand from you and we hereby do, of the following:
>
> (1) To return or caused to be returned the said two Bonds with immediate effect for Liziz's cancellation of the same with Maybank.
>
> (2) By providing the above Bonds, Liziz is incurring bank charges and damages amounting to RM1,563.00 per day and you are to pay all the losses and damages suffered by our client effective from 25.7.2019 and continuing until full cancellation of the above Bonds.

[116] The petitioner's solicitors' reply of 3 January 2020 was not that there was never any discussion of Maybank's offer to take over all of the respondent's existing facilities but rather as follows:

A We wish to state that our client has every right to reject Maybank's offer to take over all of Liziz's existing facilities and to reject the offer based on the terms offered by Maybank. Our view is that notwithstanding Liziz's termination of the Joint Venture Agreement, the retention of performance bond and guarantees by BHP or the Government of Malaysia (the Beneficiaries) is a matter between the Issuing Bank and the Beneficiaries. We have no control over what the Beneficiaries decide to do with them.

[117] The tone and tenor of the above reply from the petitioner through its solicitors was that of washing its hands clean of the problem and responsibility with respect to the advance payment bond and performance guarantee, forgetting for a moment that these had been secured as part of the respondent's obligation under the JVA. There has also not been any evidence shown that the respondent has delayed in the execution of the works before the termination of the JVA. Whether someone in the position of the respondent would so easily throw in the towel and resile from the JVA without confirming how pending obligations in the advance payment bond and the performance guarantee and other outstanding financial obligations between the parties are to be sorted out would be a matter that can only be conclusively determined at a trial.

[118] There is no evidence that the respondent had slowed down or delayed in the works, much less abandoned the works or stop work altogether because of a lack of financial resources to carry on with the works. In such a circumstance would the respondent have repudiated the JVA without some understanding, arrangement or agreement between the parties as to how to sort out and unentangle outstanding financial obligations?

[119] As the security for Maybank granting various facilities for the project is chiefly based on the strength of the assignment of the JVA to the bank and the personal guarantee and indemnity given by the directors of the respondent, it is an arguable case and certainly not inherently incredible as to whether the agreement to withdraw from the project was premised on the existing facilities for the project to be taken over by the petitioner.

[120] The JVA having been terminated, there is no more security in the JVA to be assigned but the petitioner, having decided to carry on the project by themselves, would have the benefit of the contract between them and BHP to be assigned to the bank. The neatness and expediency of taking over the facilities would be the continuing benefit and with that the burden of such an exposure to liability of the petitioner where the advance payment bond and the performance guarantee are concerned.

[121] The structure and security for the facilities for this project is such that it is primarily on the strength of the proceeds that the Government of Malaysia

would pay the PDP in BHP and that BHP would in turn pay the petitioner which progress payment sums would be disbursed in the proportion of 8%: 92% to the accounts of the petitioner and the respondent and from there, with the assignment of the JVA to Maybank, Maybank would be assured of repayment for the facilities taken for the project which total sum to be received would be the main contract sum of RM972,020,000 if the project proceeds to completion.

[122] Depending on how efficient a contractor executes the works, the loan taken for each progress certification of works done would progressively be pared down with each payment from the government through BHP. Upon termination, in this case of the JVA, there would be no more progress payments of the main contract sum and so the contractor would have to arrange for a way for the loan taken to be repaid.

[123] We would accept the fact that for a case like this the employer in the petitioner is not obliged to take over any of the facilities taken by the contractor in the respondent. However, where the petitioner is still enjoying the benefit of the facilities taken in the advance payment bond and the performance guarantee and that there appears to be some evidence that the petitioner had been using some of the facilities taken by the respondent as set out in the respondent's solicitors CK Lim, Tenh & Chong's letter of demand dated 27 December 2019 to the petitioner, it cannot be said that the debt for which the petitioner is seeking to wind up the respondent is not disputed or that the respondent does not have an arguable and bona fide crossclaim or set off against the debt alleged and on substantial grounds.

[124] From the above breakdown of the amount which the respondent has filed with the court in a separate claim by the respondent against the petitioner, it appears that the parties have some on-going projects with each other.

[125] It is not for the winding up court to descend into the details of the set off that the respondent had raised via its affidavit to oppose the petition and to weigh and consider the probabilities of success lest the petition be converted into a writ action which would not be amenable to resolution by way of conflict in affidavit evidence.

[126] The winding up court is to assess without deciding on the counterclaim in a sieving through process to see if the claim has weight or raises a serious issue.

[127] Such was the approach taken by the Court of Appeal in relation to a claim of a crossclaim or counterclaim by the respondent company in relation to a winding up petition filed in *Pontian United Theatre Sdn Bhd v Southern*

Finance Berhad (Dahulunya Dikenali Sebagai United Merchant Finance Berhad) [2006] 2 MLJ 602 as follows:

> [19] It is not sufficient for a company facing a winding up petition to merely aver by affidavit the existence of a meritorious counter claim and exhibit for proof the statement of defence and counter claim, which is not evidence. Evidence is required. The company must set out in the affidavit the facts on which the counter claim is based, giving the necessary details so as to lend earnestness and weight to their claim and so that the petitioner will have a fair opportunity to present his side of the story by affidavit and *the court, by considering the affidavits, will* be able to assess, without actually deciding it, whether the *claim has weight or raises a serious issue.* (Emphasis added.)

[128] Even in the context where a fortuna injunction is applied for to restrain the filing of a winding-up petition where a debt is undisputed, it was held by Mary Lim J (now FCJ) in *Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd* [2014] 11 MLJ 916 as follows:

> [49] Secondly, *where a debt is undisputed, an injunction may nevertheless be ordered where a genuine crossclaim based on substantial grounds is raised. In such a case, the courts recognise that the presentation of such a petition might produce irreparable damage to business and reputation*. Thirdly, the burden of proof in both instance of disputed debt and undisputed debt is whether there is a likelihood that the petition to wind up may fail or that it is unlikely that a winding up order would be made; as opposed to a test that the petition is bound to fail'. (Emphasis added.)

[129] Granted the court would often have to hold in a dynamic balance two opposing principles: the mere fact of a crossclaim or a counterclaim is never of itself a bar to the making of a winding up order on a petition by a petitioning creditor (see the case of *In re Douglas Griggs Engineering Ltd* [1963] Ch 19 and on the other hand, where a company has a genuine and serious crossclaim or counterclaim against the petitioning creditor which it had not reasonably been able to litigate, the petition should usually be dismissed or stayed (see the case of *In re LHF Wools Ltd* [1970] Ch 27).

[130] So long as the set off, crossclaim or counterclaim is not completely fanciful and for so long as it has the colour and cover of credible claim in the context of the alleged debt being disputed and on substantial grounds, the court would not be comfortable to grant a winding up order but would instead dismiss the petition.

Whether the respondent's filing of an application for judicial management would stay all winding up proceedings that are pending including advertisements and gazette of the petition

[131] Section 410(c) of the CA 2016 is quite clear in that all proceedings are

stayed and that would include a winding up petition. Upon the application of the judicial management order ('JMO') but before the making of such order, there shall be a moratorium on all other legal proceedings. Section 410 reads as follows:

> 410 During the period beginning with the making of an application for a judicial management order and ending with the making of such an order or the dismissal of the application —
>
> (a) No resolution shall be passed or order made for the winding up of the company;
>
> (b) No steps shall be taken to enforce any charge on or security over the company's property or to repossess any goods in the company's possession under any hire purchase agreement, chattels leasing agreement or retention of title agreement, except with leave of the Court and subject to such terms as the Court may impose; and
>
> (c) *No other proceedings* and no execution or *other legal process shall be commenced or continued*, and no distress may be levied against the company or its property *except with leave of the Court* and subject to such terms as the Court may impose. (Emphasis added.)

[132] The learned judge had held that the petitioner may still proceed with taking the necessary steps under the Companies (Winding-Up) Rules 1972 with respect to advertising and *gazette* of the petition and do all that is necessary to get the petition ready for hearing. It is only that the winding up court cannot make a winding up order when there is a JMO application filed by the respondent in the petition. See para [24] of the GOJ of the High Court. With respect, we do not agree.

[133] It is not in dispute that respondent had filed an application for a JMO in the High Court of Malaya in Ipoh on 3 July 2020; after the winding up petition was filed against it on 15 June 2020.

[134] We do not think we need to question the wisdom of the legislature in this aspect of staying all other proceedings including a winding up petition as the company applying for a JMO cannot be expected to resist all legal actions from different fronts when it is warding off these actions in the hope of coming up with a rescue plan that would enable all to be paid in the proportions to be agreed so that all may survive.

[135] The Supreme Court of New South Wales' decision in *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 1305 on the moratorium in administration has succinctly summarised the reasons for it as follows:

> [38] The stay of proceedings imposed by s 440D may facilitate the achievement of this object, among others, by:

A
(a) affording the administrator time to assess and report on the company without the distraction of the proceedings;

(b) putting a brake on legal and associated costs;

(c) allowing time for the development of proposals which might preserve the
B value of the company as a going concern;

(d) giving the creditors time to consider their position for the purposes of the creditors' meeting; and

(e) in appropriate circumstances, preventing a creditor from obtaining some
C advantage over other creditors or potential creditors.

[39] While the discretion under s 440D must be exercised with the objects of the part in mind, it remains one at large. *A stay is the starting point. There must be circumstances which warrant its displacement.* (Emphasis added.)

D **[136]** Its efforts during this time is to focus on convincing creditors to support its rescue scheme for once a winding up order is made, the whole rescue plan would have been scuttled unless a stay order could be obtained.

E **[137]** It would be quite inconsistent to say that there shall be no order made for winding up of the company after the filing of an application for a JMO but that nevertheless all requirements under the Companies (Winding-Up) Rules 1972 with respect to compliance with the procedure set out under the Rules may still be proceeded with.

F
[138] Even if the advertisements and gazette of the Petition are not strictly speaking steps in the proceedings, surely the filing of the Affidavits of Service with respect to advertisement and gazetting so as to enable the Rule 32 Certificate to be issued by the Registrar would be 'continuing with the
G proceedings'.

[139] The learned judge was concerned about possible abuse of the JMO application just so that all proceedings may be stayed pending the hearing of the JMO application. The solution is already built into s 410 of the CA 2016
H itself in that leave to proceed may be applied for and the court may exercise its discretion to grant leave where there are cogent reasons for such a leave and the court may even impose such terms as the court may deem fit in granting the leave. See the case of *Re Top Builders Capital Bhd & Ors* [2021] 10 MLJ 327 for a consideration of the relevant factors in granting leave to a party to continue
I proceedings in a scheme of arrangement under ss 366 and 368(1) of the CA 2016.

Whether the fact that the respondent is insolvent would be sufficient cause for the winding up order to be made

[140] The question of whether the respondent is insolvent is of no relevance if in the first place there is no genuine debt due and owing from the respondent. In other words, even if the respondent be insolvent, that is of no consequence and to use a colloquial term, none of the petitioner's business, if there is not in the first place be in existence a debt due and owing to the petitioner.

[141] It is for the creditors who have judgment debts or undisputed and genuine debts to decide on whether they should wind up the respondent or enter into a composition with them or to approve or disapprove the respondent's proposal in a judicial management application such as the one filed by the respondent before the petition was heard.

[142] This point was recently addressed in *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2021] 8 MLJ 99 as follows:

> [38] In the instant case, learned counsel for the defendant contended that there is evidence that the plaintiff is insolvent. However, *it is also settled that if the debt upon which the winding up petition is to be based is genuinely disputed on substantial grounds, whether the company is insolvent or not, is of no moment.* As Gopal Sri Ram JCA stated in *Mobikom Sdn Bhd* at p 321 of the report:
>
> > Once the debt on which the proposed petition is based is bona fide disputed it matters not that the debtor company is in fact insolvent. See, *Mann v Goldstein* [1968] 2 All ER 769. (Emphasis added)

[143] See the cases of *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316 and *RHB Bank Bhd v Malaysia Pacific Corp Bhd and another appeal* [2018] MLJU 103 where the Court of Appeal agreeing with the above principle held as follows:

> [24] The observations of this court in *Mobikom* must be understood to have been made in that context, that once a debt on which a petition is based is bona fide disputed, it matters not that the debtor company is in fact insolvent.

[144] We therefore do not consider the non-disclosure of the respondent's application for a JMO as a material non-disclosure for to begin with, it is not relevant if the debt here is bona fide being disputed on substantial grounds.

[145] Even with the respondent admitting its own insolvency in the JMO application, that does not derogate from the principle that only a creditor for an undisputed debt has the legal standing or locus to present a winding up petition.

[146] It is of course a ground as provided under s 465(1)(e) of the CA 2016 for a debtor company that is unable to pay its debt to be wound up by its creditors. However, the winding up has to be at the instance of a creditor who has the

A locus to present the petition on account of a debt not in dispute. It cannot be at the instance of a so-called creditor whose debt for which it sought to wind up its debtor is seriously and substantially in dispute.

B **[147]** The means of a statutory notice under s 466(1)(a) of the CA 2016 is merely to activate the 'deeming' provision to bring about a factual situation of the debtor's inability to pay its debt to the creditor, justifying winding up on the ground inability to pay its debt to the said creditor in s 465(1)(e) of the CA 2016. The 'debt' must be a genuine debt to begin with and not a disputed debt.

C **[148]** The said petitioner, upon a failure to show that the respondent's debt is not in dispute or cannot be disputed, cannot proceed unabashedly to say that nevertheless the respondent should be wound up because of its own admission of insolvency! It is for the other genuine creditors to decide that question and D they may well extend grace to the respondent in a case where they have not presented any winding up petition. There is no place for a petitioner who cannot satisfy the requirement of a debt not in dispute to argue nevertheless that it is championing a matter of public interest and serving the public good in that an insolvent company should be wound up and not be allowed to E continue doing its business.

[149] With the greatest of respect to the learned High Court judge, we have to dissociate and distance ourselves from the proposition of law set out by him as follows in his GOJ:

F

> [56] I find by this fact alone namely of the respondent's admitted inability to pay its debts, the respondent is deemed unable to pay its debts. This fact alone would require this court to wind up the respondent irrespective of whether or not, the debt of RM8,679,245.28 demanded under s 466(1)(a), is disputed or set off by the Respondent's crossclaims.'

G

[150] We accept that under s 475 of the CA 2016 winding up is considered a class action in the interest of all the creditors of the debtor company as follows:

H

> An order for winding up a company shall operate in favour of all the creditors and contributories of the company as if made on the joint petition of a creditor and of a contributory.

[151] However we must not lose sight of a far more basic first principle in that I the petition must still be at the instance of a creditor who has the right to present a petition because the debt for which it is seeking to wind up the debtor is not in dispute.

[152] By the same token if a creditor seeks to file its proof of debt upon the debtor company being wound up by some other creditors, its own proof of debt would be rejected by the liquidator if it is shown that the debt is genuinely disputed and on substantial grounds.

PRONOUNCEMENT

[153] Having viewed the totality of the disputes raised in the context of this claim of an undisputed debt by the petitioner, we are satisfied that this is a fit and proper case where the winding up order granted by the High Court should not have been made and so we would set aside the winding up order.

[154] This is a case where upon the termination of the JVA, there is more than meets the eye where the petitioner's claim and the respondent's counterclaim are concerned. The debt is being disputed bona fide and on substantial grounds.

[155] We cannot afford to take a skewed and selective reading of the obligations of the parties that are still outstanding especially with regard to the advance payment bond and the performance guarantee procured by the respondent from Maybank which have not been cancelled.

[156] Coupled with that are the charges imposed by Maybank for the above two facilities and the dispute in the purchase of the quarry plant, vehicles and equipment. The subject matter of the counterclaim with respect to the misrepresentation raised by the respondent is not so fanciful as to dismiss it here and now as being fictional, frivolous and a figment of one's imagination.

[157] If at all the issues are so clear cut as contended by the petitioner, then there should be no problem to seal the amount claimed by way of a summary judgment in a suit to be commenced.

[158] We allowed the appeal and set aside the winding up order of the High Court with costs RM10,000 here and below, to the appellant here who was the respondent in the High Court, subject to allocatur.

Appeal allowed; winding up order of High Court set aside with costs RM10,000 here and below to appellant subject to allocatur.

Reported by Dzulqarnain Ab Fatar